No. 03-1388

Supreme Court, U.S.
FILED
JAN 27 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DOUGLAS SPECTOR, *et al.*,

Petitioners,

v.

NORWEGIAN CRUISE LINE, LTD.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF *AMICUS CURIAE* OF AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., ASSURANCEFORENINGEN GARD (GJENSIDIG), ASSURANCEFORENINGEN SKULD (GJENSIDIG), BRITANNIA STEAM SHIP INSURANCE ASSOCIATION LTD., JAPAN SHIPOWNERS' MUTUAL P&I ASSOCIATION, LONDON STEAM SHIP OWNERS MUTUAL INSURANCE ASSOCIATION LTD., NORTH OF ENGLAND PROTECTING AND INDEMNITY ASSOCIATION LTD., SHIPOWNERS' MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG), STANDARD STEAMSHIP OWNERS PROTECTION AND INDEMNITY ASSOCIATION (BERMUDA) LTD., STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION (BERMUDA) LTD., SVERIGES ANGFARTYGS ASSURANS FORENING, UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LTD., AND WEST OF ENGLAND SHIPOWNERS MUTUAL INSURANCE ASSOCIATION (LUXEMBOURG) IN SUPPORT OF RESPONDENT

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January 28, 2005

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American Steamship Owners Mutual Protection and Indemnity Association, Inc., Assuranceforeningen Gard (Gjensidig), Assuranceforeningen Skuld (Gjensidig), The Britannia Steam Ship Insurance Association Ltd., The Japan Shipowners' Mutual P&I Association, The London Steam Ship Owners Mutual Insurance Association Ltd., The North of England Protecting and Indemnity Association Ltd., The Shipowners' Mutual Protection and Indemnity Association (Luxembourg), The Standard Steamship Owners Protection and Indemnity Association (Bermuda) Ltd., The Steamship Mutual Underwriting Association (Bermuda) Ltd., Sveriges Angfartygs Assurans Forening, The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd., and The West of England Shipowners Mutual Insurance Association (Luxembourg) – together known as the International Group of Protection and Indemnity (P&I) Clubs (collectively referred to here as "*Amici* P&I Clubs") – respectfully submit this brief as *amici curiae* in support of Respondent.

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici comprise thirteen mutual insurance associations known as "protection and indemnity clubs" (often abbreviated "P&I Clubs."). P&I Clubs are "associations of shipowners banded together to spread and absorb liabilities falling on their members." Grant Gillmore & Charles L. Black, Jr., THE LAW OF

[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation and submission of this brief.

ADMIRALTY (2d ed. 1975); see also 2 Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW § 19-12 (4th ed. 2004) (for the history and function of P&I Clubs); Leslie J. Buglass, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES 386-418 (3d ed. 1991); T.G. Coghlin, *Protection & Indemnity Clubs*, 1984 LLOYD'S MAR. & COM. L. Q. 403, 405-11; Mark Tilley, *The Origin and Development of the Mutual Shipowners Protection & Indemnity Association*, 17 J. MAR. L. & COM. 261 (1986); Norman J. Ronneberg, Jr., *An Introduction to the Protection & Indemnity Clubs and the Marine Insurance They Provide*, 3 U.S.F. MAR. L.J. 1 (1991). The individual P&I Clubs as *amici curiae* here form together a trade association known as the International Group of P&I Clubs.

The members of *amici* are owners, operators, and charterers of ships of practically all maritime nations. The thirteen clubs represented here insure nearly ninety percent (90%) of the world's ocean-going ship tonnage. The P&I Clubs themselves are non-profit mutual organizations, insofar as member shipowners insure one another on an indemnity basis against a variety of third party liabilities relating to the use and operation of ships, particularly those risks not otherwise covered by a vessel's hull policy. One large class of such liability exposures is those arising from the lack of compliance with international maritime standards, or the laws and regulations of particular port States where vessels may come to call. *Amici* P&I Clubs have a great interest in the substantial uniformity of international maritime law. They are thus desirous to avoid situations where individual port States may (through their national legislation or regulatory schemes) inadvertently establish rules at variance with international standards.

None of the *amici* here have any direct exposure for the risks associated with the Respondent's compliance (or lack thereof) with the Americans with Disabilities Act (ADA), at

least in regard to Petitioners' claims. *Amici* nonetheless have a vital interest in the proper interpretation of the legal standards under which liability may be imposed, whether in the United States or in any other maritime country.

An important policy objective for *amici* is ensuring a system by which national maritime legislation, particularly that affecting the construction, design, equipment and manning of foreign-flagged vessels, is harmonized with international standards. These rules – often referred to by their acronym as "CDEM" regulations – are typically reflected in international maritime law treaties negotiated and adopted by such institutions as the International Maritime Organization (IMO), the specialized U.N. agency (based in London) dedicated to global shipping regulation. The international uniformity of CDEM regulations reflect the obvious fact that no vessel could be expected to sail around the world and comply with each individual nation's (perhaps) eccentric rules about ship structure or configuration.

Amici P&I Clubs carry no brief here as to the policy wisdom of such laudable pieces of legislation as the ADA. Nonetheless, in making their case that the ADA's access requirements ought to be extended to passengers on foreign-flagged cruise vessels, Petitioners (and their *amici*) make a broad-gauge attack against the long-standing and well-supported canon of statutory construction that Congress does not intend to legislate CDEM rules for foreign-registered vessels, absent a clear statement to that effect. See *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 23 (1963); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 143-44, 147 (1957); *Incres Steamship Co. v. Int'l Maritime Workers Union*, 372 U.S. 24 (1963). Along the way, Petitioners and their *amici* gratuitously condemn international maritime laws and regulations which have governed ocean shipping for centuries,

as well as the historied prerogative of the State of a vessel's registration (what is known as the "flag State") to manage and control all aspects of that vessel's operations, particularly its compliance with international CDEM regulations. In order to reach the result they desire in this litigation, Petitioners and their *amici* would have this Court repudiate the entire structure of international maritime regulation, in favor of some unspecified regime of unilateral port State control, in which any coastal State has the unbridled authority to legislate rules for the construction, design, equipment and manning of foreign vessels calling at its ports, with no solicitude for international standards. *Amici* P&I Clubs – which, for centuries, have sought to facilitate and promote maritime commerce and the uniformity of international maritime law – are justifiably concerned at such a prospect.

Amici shall leave it to other parties to brief this Court on Congress's precise intent in legislating Title III of the ADA. It seems beyond cavil, however, that Congress expressed no intent to apply access requirements to foreign-flagged vessels. Implicated in this case is the *McCulloch-Benz* canon of presuming that Congress does not intend to legislate for foreign vessels, unless there is a clear statement to that effect. But it is not enough to espouse a substantive canon of statutory construction. To the extent that such presumptions and clear statement rules have embedded within them important policy preferences, it remains to justify them as a matter of continuing jurisprudence. In this submission, *amici* P&I Clubs endeavor to do just that.

SUMMARY OF ARGUMENT

I. This Court has for 150 years consistently applied a clear statement rule that general statutes will not be deemed to

apply to foreign vessels visiting U.S. ports, absent "the affirmative intent of Congress[,] clearly expressed." *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 22 (1963); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 143-44, 147 (1957); *Brown v. Duchesne*, 60 U.S. (19 How.) 183 (1856). Where this Court has concluded that such statutes do apply to foreign-flagged vessels, there was express language to that effect, or some other clear manifestation of congressional intent. *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 119-21 (1923).

The *McCulloch-Benz* canon is particularly relevant where a statute purports to affect a foreign vessel's construction, design, equipment or manning (CDEM). In these situations, this Court has held that Congress must, via a clear statement, expressly apply the statutory scheme where there is "more than a negligible impact on the 'marine operations' of . . . foreign ships." *Windward Shipping (London) Ltd. v. Am. Radio Ass'n*, 415 U.S. 104, 114 (1974) (referencing language in *McCulloch*).

This Court has also rejected attempts to supplant the *McCulloch-Benz* canon with the more inchoate and fact-intensive inquiry of choice-of-law interest analysis, as reflected in such decisions as *Lauritzen v. Larsen*, 345 U.S. 571, 585 (1953), and *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 310 (1970). Jettisoning a clear statement test in favor of such interest balancing would, in the words of the *McCulloch* Court, "project the courts into application of the sanctions of [statutes] to foreign-flag ships on a purely *ad hoc* weighing of contacts basis," 372 U.S. at 19, and should be avoided.

II. The chief function of the *McCulloch-Benz* canon is to preserve this country's international maritime law obligations, and, for that reason, should not be lightly ignored. International law privileges flag States as the primary (although not exclusive) prescriber and enforcer of international maritime safety rules. *McCulloch*, 372 U.S. at 21; *Lauritzen*, 345 U.S. at 585. This

Court has recognized international standard-setting for maritime operations. See *Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER*, 515 U.S. 528, 539 (1995); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 166-67 (1978). The *McCulloch-Benz* canon ensures that Congress does not inadvertently legislate against these international maritime norms. The canon is also consistent with the clear statement rule that statutes should not be presumed to apply extraterritorially, *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949), and that Acts of Congress should be construed consistently with this country's international law obligations. *F. Hoffmann-La Roche, Ltd. v. Empagran*, 124 S.Ct. 2359, 2366 (2004).

III. The contrary position of the United States should be given no special deference here. This Court has rejected Executive branch positions as to the application of a statute, where such conflict with established clear statement rules or other statutory construction principles. *McCulloch*, 372 U.S. at 18-20; *Equal Employment Opportunity Comm'n v. Arabian American Oil Co. (ARAMCO)*, 499 U.S. 244, 257-58 (1991).

ARGUMENT

I. The Presumption that Congress Does Not Intend to Legislate for Foreign Vessels in U.S. Ports, Absent a Clear Statement to that Effect, Should be Applied in this Case.

The nub of this case is whether this Court should apply a particular canon of statutory construction as a means of determining congressional intent, in the absence of clear language in Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. 12181 *et seq.*, applying those provisions to foreign-flagged cruise ships loading and discharging passengers in U.S. ports. That canon is one of a handful of so-called "clear

statement" rules, suggesting that there is no congressional intent to reach certain norms or conduct, absent clear language to that effect. See William N. Eskridge & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992). Clear statement rules have come to be extraordinarily influential in this Court's jurisprudence, patrolling the boundaries of federalism, the separation of powers among the branches of the federal government, and the fulfillment of this nation's international obligations.

The canon against the application of congressional enactments to foreign-flagged vessels in U.S. ports, absent a clear statement to that effect, falls into the last category – intended to effectuate and promote this country's international law responsibilities. See *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 23 (1963); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 143-44, 147 (1957). By virtue of its circumscribed character, as almost a sub-species of broader clear statement rules in foreign relations cases, the *McCulloch-Benz* canon hardly rates as a significant drafting restraint on congressional authority in most cases. But it does figure here, and despite its narrow scope, this presumption of congressional intent effectuates significant foreign policy concerns, as well as the practical operation of U.S. and international maritime law. For these reasons, the canon should be applied here, notwithstanding the grounds raised by Petitioners and their *amici* to disregard it, or to relegate it to obscurity or irrelevance.

A. A Clear Statement Rule for Legislation that Impacts Foreign-Flagged Vessels is Long-Standing and Significant.

Understanding the *McCulloch-Benz* canon begins with the unremarkable observation that it is obviously within

Congress's powers under the Foreign Commerce Clause, U.S. CONST., art. I, § 8, cl. 3, to prescribe whatever rules and regulations it deems appropriate to foreign vessels who ply U.S. waters or call at U.S. ports, so long as they are consistent with the Port Preference Clause, id. art. I, § 9, cl. 6. International law principles of territorial sovereignty and jurisdiction, enshrined in such cases as *The Schooner EXCHANGE v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), are not in question here, and *amici* P&I Clubs harbor no doubt whatsoever that Congress may extend the ADA's access requirements to foreign cruise vessels. But that is not the issue here. Rather, the question is whether – in the face of congressional silence, or (at a minimum) substantial ambiguity as to congressional intent – it is proper for this Court to presume such an intent. Or, as this Court put the matter in *Benz*, "The exercise of that jurisdiction [over foreign vessels] is not mandatory but discretionary. Often, because of public policy or for other reasons, the local sovereign may exert only limited jurisdiction and sometimes none at all. . . . The question here therefore narrows to one of intent of the Congress as to the coverage of the Act." 353 U.S. at 142 (citing *Cunard S.S. Co. v. Mellon*, 262 U.S. 100 (1923)). And, unless "the affirmative intent of Congress [is] clearly expressed," *McCulloch*, 372 U.S. at 22, legislation should not be presumed to reach foreign vessels in U.S. ports or waters.

The *McCulloch-Benz* canon counsels caution and rectitude, a posture that this Court has consistently taken through the years. One striking example of this is in *Brown v. Duchesne*, 60 U.S. (19 How.) 183 (1856), where the issue was application of U.S. patent laws to a foreign vessel visiting a U.S. port. The Court first discussed general rules of statutory construction, requiring a contextual reading of an Act in view of congressional intent. See id. at 194. In view of this, the Court concluded that:

> The patent laws were passed to accomplish a different purpose, and with an eye to a different object; and the right to interfere in foreign intercourse, or with foreign ships visiting our ports, was evidently not in the mind of the Legislature, nor intended to be granted to the patentee.

> Congress may unquestionably, under its power to regulate commerce, prohibit any foreign ship from entering our ports, which, in its construction or equipment, uses any improvement patented in this country, or may prescribe the terms and regulations upon which such vessel shall be allowed to enter. Yet it may perhaps be doubted whether Congress could by law confer on an individual, or individuals, a right which would in any degree impair the constitutional powers of the legislative or executive departments of the Government, or which might put it in their power to embarrass our commerce and intercourse with foreign nations, or endanger our amicable relations. (Id. at 197.)

Nearly 150 years ago, the *Brown* Court articulated the broad contours of this clear statement rule: despite Congress's undoubted powers to regulate foreign vessels, such would not be presumed to be congressional intent, owing to a confluence of a desire to avoid "embarass[ment]" of maritime commerce or "endanger[ment]" of foreign relations, as well as a practical concern of "interfer[ing]" with "foreign ships visiting our ports." Rather, such an intent should be confirmed by clear language, "'a few words would have stated that intention, not leaving such an important regulation to be gathered from implication'." *Benz*, 353 U.S. at 145 (quoting *Sandberg v. McDonald*, 248 U.S. 185, 195 (1918)); *McCulloch*, 372 U.S. at 20 ("We continue to believe that if the sponsors of the original Act or of its amendments conceived of the application now sought by the Board they failed to translate such thoughts into describing the

boundaries of the Act as including foreign-flag vessels manned by alien crews.").

This Court has consistently required Congress to express in clear terms an intent to apply legislation to foreign vessels in U.S. ports. See *Patterson v. Eudora*, 190 U.S. 169, 173 (1903) ("When, as here, the statute declares, in plain words, its intent in reference to a prepayment of seamen's wages, and follows that declaration with a further statement that the rule thus announced shall apply to foreign vessels as well as to vessels of the United States, it would do violence to language to say that it was not applicable to a foreign vessel."); *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 119-21, 128 (1923) ("In principle, therefore, it is settled that the amendment could be made to cover both domestic and foreign merchant ships when within the territorial waters of the United States. And we think it has been made to cover both when within those limits. It contains no exception of ships of either class and the terms in which it is couched indicate that none is intended. Such an exception would tend to embarrass its enforcement and to defeat the attainment of its obvious purpose, and therefore cannot reasonably be regarded as implied."). Where this Court has construed an Act to apply to foreign vessels, there was express language of the statute supporting such an interpretation, or some other manifestation of congressional intent for the legislation to so apply.

B. Petitioners' Attempts to Limit the Rationale of the *McCulloch-Benz* Canon Should be Unavailing.

Petitioners and their *amici* raise a host of arguments in order to limit the potential application of the *McCulloch-Benz* clear statement rule for congressional enactments affecting foreign vessels. The cumulative effect of these limiting rationales would be to either reduce the *McCulloch-Benz* canon to the vanishing point of irrelevance, or to repudiate it entirely

in favor of an interest balancing approach that is simultaneously standardless and incoherent. Ironically, all of the limiting grounds advanced by Petitioners have been considered, and rejected, by this Court in its previous decisions. The Court should take this opportunity to reaffirm the *McCulloch-Benz* canon of statutory construction in its original, and robust, form.

1. *The* McCulloch-Benz *canon is not merely employed to avoid sensitive diplomatic disputes.* Petitioner's argument seems to be based on language from *McCulloch* and *Benz*, which describes the issues before the Court as "delicate field[s] of international relations." *McCulloch*, 372 U.S. at 21-22; *Benz*, 353 U.S. at 147. Yet, the *Benz* Court's holding that, "[Congress] alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action certain," seems ancillary to the "clear statement" rule articulated in that decision. See *Benz*, 353 U.S. at 147.

In *McCulloch*, the Court ruled that where Congress "failed to translate such thoughts into describing the boundaries of the Act as including foreign-flag vessels manned by alien crews . . . [there was] no basis for a construction which would exert United States jurisdiction over and apply its laws to the international management and affairs of the vessels [at issue]." *McCulloch*, 372 U.S. at 20. In both *McCulloch* and *Benz*, the Court held that for the judiciary to sanction the exercise of local territorial sovereignty over foreign vessels in U.S. ports, "there must be present the affirmative intention of the Congress clearly expressed." Id. at 21-22; see also *Benz*, 353 U.S. at 147.

For reasons that will be explained in more detail below, see *infra* Part III, to characterize the *McCulloch-Benz* canon as merely a device to serve the interests of the Executive branch in avoiding sensitive diplomatic disputes with other seafaring nations, ignores its role as a means of counseling the extension

of congressional power and authority to regulate foreign commerce under the Constitution. Just as the Executive branch cannot selectively enable or disable the *McCulloch-Benz* canon to serve its ends, neither should the presumption be construed to be limited to situations where diplomatic disputes with other maritime nations are necessarily "evident" and "certain." *Benz*, 353 U.S. at 147.

2. *The* McCulloch-Benz *canon was never intended as a permissive "rule of reason," to be applied in a regulation-by-regulation calculus*. Petitioners and their *amici* suggest that the clear statement rule requiring that Congress expressly apply legislation to foreign-flagged vessels, is best seen in an entirely contextual light, contingent on the nature of the regulation under review. This argument would essentially convert a "clear statement" rule into a highly-nuanced and fact-intensive analysis, dependent on the underlying policy objectives of the subject regulation.

This Court has adamantly rejected such an approach, by no less an authority than the *McCulloch* decision itself. In discussing the nature of orders issued by the National Labor Relations Board – which impacted the crewing operations of foreign vessels – the Court observed:

> [t]o follow such a procedure . . might require that the Board inquire into the internal discipline and order of all foreign vessels calling at American ports. Such activity would raise considerable disturbance not only in the field of maritime law but in our international relations as well. In addition, enforcement of Board orders would project the courts into application of the sanctions of the Act to foreign-flag ships on a purely *ad hoc* weighing of contacts basis. This would inevitably lead to embarassment in foreign affairs and be entirely infeasible in actual practice. The question, therefore,

> appears to us more basic; namely, whether the Act as written was intended to have any application to foreign registered vessels employing alien seamen.

McCulloch, 372 U.S. at 19.

This Court should reject Petitioners' overture to alter the fundamental character of the *McCulloch-Benz* canon as a clear statement rule for divining congressional intent. No matter how laudable a statute may be, nor how compelling its public purposes – and *amici* P&I Clubs hardly doubt that such may be true for the ADA – it cannot substitute for "the affirmative intention of Congress[,] clearly expressed." Id. at 22.

3. *The* McCulloch-Benz *canon should not be displaced by Petitioners' proposed interest balancing test*. Petitioners and their *amici* rely on an analytically distinct line of this Court's maritime choice-of-law cases, in order to fashion from whole cloth a competing rule of decision. See Pet. Br. 9, 33-35; U.S. Amicus Br. 24-25; Gutoff Amicus Br. 20-29; Nine Associations Amicus Br. 3-5, 20-21. Of all the arguments made by Petitioners and their *amici*, this poses the gravest threat to the integrity of this Court's maritime jurisprudence and the consistent application of federal statutes to foreign vessels.

Petitioners rely primarily on a series of cases concerning the application of the Jones Act, 46 U.S.C. 688, to a foreign seaman on a foreign vessel, *Lauritzen v. Larsen*, 345 U.S. 571, 585 (1953); and a foreign seamen serving on board a foreign-flagged vessel that was nevertheless benefically owned by U.S. citizens. *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 310 (1970). In *Lauritzen*, this Court articulated seven interest balancing factors and concluded that foreign law applied to the seamen's injuries, and the Jones Act did not. 345 U.S. at 592-93. In *Hellenic Lines*, the Court employed the same analysis – even while adding an additional factor (the shipowner's base of

operations) – and concluded that U.S. interests prevailed in the controversy, and that the seamen's employer was covered under the Jones Act. 398 U.S. at 309-10. See also *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 384 (1959) (rejecting application of Jones Act under *Lauritzen* test).

Quite clearly, the *Lauritzen* Court was extending to the maritime choice-of-law context for torts, the same general interest balancing equations that were common for terrestrial choice-of-law determinations, as later reflected in the RESTATEMENT (2D) OF CONFLICT OF LAWS § 6 (1971). Putting aside such questions as the applicability of the *Lauritzen-Rhoditis* test for causes of action not sounding in maritime personal injury, there is an even broader problem with Petitioners' submission. On its own terms, *Lauritzen*'s choice-of-law calculus is inapplicable to situations where there is the threshold issue of whether federal legislation should even be deemed applicable to a foreign vessel. As the Court noted in *Lauritzen*, in the Jones Act

> Congress in 1920 wrote these all-comprehending words [extending its terms to "all employers"], not on a clean slate, but as a postscript to a long series of enactments governing shipping. All were enacted with regard to a seasoned body of maritime law developed by the experience of American courts long accustomed to dealing with admiralty problems in reconciling our own with foreign interests and in accommodating the reach of our own laws to those of other maritime nations.

Lauritzen, 345 U.S. at 577. It can hardly be suggested here that Congress legislated the ADA in such a manner.

In short, the *Lauritzen-Hellenic* line of cases were never intended by this Court to "erase longstanding principles of comity and accommodation in international maritime trade."

Windward Shipping (London) Ltd. v. Am. Radio Ass'n, 415 U.S. 104, 112-13 (1974) (referring to NLRA). Or, as this Court put it in *Romero*, "[i]n the absence of a contrary congressional direction, we must apply those principles of choice of law that are consonant with the needs of a general federal maritime law and with due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community." 358 U.S. at 382-83; see also *Hellenic Lines*, 398 U.S. at 312-14 (Harlan, J., dissenting).

This Court has already rejected the proposition that a conflicts-of-law test, featuring interest balancing, should supplant the anterior analysis of whether Congress even intended general legislation to apply to foreign vessels. As noted in *McCulloch*, "enforcement of [such statutes against foreign-flagged vessels] would project the courts into application of the sanctions of the Act to foreign-flag ships on a purely *ad hoc* weighing of contacts basis." 372 U.S. at 19. *McCulloch*, handed down after *Lauritzen*, manifestly contemplated that the clear statement test for congressional intent in the maritime field would be applied *before* any weighing of contacts or interests. The *Lauritzen-Hellenic Lines* interest balancing test is simply irrelevant where a statute has already been deemed, under the *McCulloch-Benz* canon, to be inapplicable to foreign vessels. To entertain any other result would mean that the application of U.S. statutes to a particular foreign vessel will turn on a host of fact-intensive inquiries, impervious to a general rule of decision. The *McCulloch-Benz* canon was intended as a way to avoid such confusion, which would be so debilitating for the uniform application of maritime regulations to ships engaged in trade.

4. *The* McCulloch-Benz *canon applies to the "maritime operations" of foreign vessels, including their construction, design, equipment and manning.* The last assault Petitioners and

their *amici* make on the *McCulloch-Benz* canon is an attempt to limit its applicability to only U.S. laws affecting foreign crews, and not to rules concerning passenger comfort and safety. See Pet. Br. 9, 33, 36-39; U.S. Amicus Br. 21-25. *Amici* P&I Clubs will leave it to other parties to explain the direct impact Title III of the ADA will have on passenger cruise line operations. The important issue for the Court's consideration, though, is whether the *McCulloch-Benz* canon should be artificially limited to only those statutes affecting the internal management and affairs of foreign vessels bearing on crews, while ignoring the effects of such regulatory regimes on the construction, design and equipment of the vessel.

The *McCulloch* Court observed that "we find no basis for [an interpretation] which would exert United States jurisdiction over and apply its laws to the internal management and affairs of the vessels here flying the Honduran flag, contrary to the recognition long afforded them not only by our State Department but also by the Congress. In addition, our attention is called to the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship." *McCulloch*, 372 U.S. at 20 (citing *Wildenhus's Case*, 120 U.S. 1, 12 (1887); Colombos, THE INTERNATIONAL LAW OF THE SEA 222-23 (3d rev. ed. 1954)). *McCulloch* also repeatedly emphasized a slightly wider objective of protecting the "maritime operations" of foreign vessels from unnecessary and chaffing U.S. regulatory interference. See id. at 13 ("We have concluded that the jurisdictional provisions of the Act do not extend to maritime operations of foreign-flag ships employing alien seamen."), 14; see also *Incres*, 372 U.S. at 27.

Indeed, in later decisions of this Court, the potential impact of a U.S. statute on a vessel's "maritime operations" was the relevant trigger for the application of the *McCulloch-Benz* clear statement rule. It was no surprise, therefore, that in a series

of cases involving unionized longshoremen picketing foreign vessels off-loading cargoes at U.S. ports, this Court found that the *McCulloch-Benz* canon was not relevant because the vessel's maritime operations were not implicated. *Int'l Longshoremens' Ass'n v. Allied Int'l Inc.*, 456 U.S. 212, 221 (1982) (boycott did not aim to alter terms of employment of foreign crews); *Int'l Longshoremens' Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195, 200 (1970) (foreign vessels employed U.S. citizens to perform short-term longshore work).

But in another set of cases, largely overlooked by Petitioners and their *amici*, this Court held the *McCulloch-Benz* canon was triggered where picketing of foreign vessels was intended to call attention to the low wages paid to foreign seamen, and thus had "more than a negligible impact on the 'maritime operations' of these foreign ships." *Windward Shipping*, 415 U.S. at 114; *Am. Radio Ass'n v. Mobile S.S. Ass'n*, 419 U.S. 215, 221-25 (1974). Summarizing the impacts on "maritime operations" for the foreign vessels and their owners, the *Windward Shipping* Court, then-Justice Rehnquist writing, observed:

> In this situation, the foreign vessels' lot is not a happy one. A decision by the foreign owners to raise foreign seamen's wages to a level mollifying the American pickets would have the most significant and far-reaching effect on the maritime operations of these ships throughout the world. A decision to boycott American ports in order to avoid the difficulties induced by the picketing would be detrimental not only to the private balance sheets of the foreign shipowners but to the citizenry of a country as dependent on goods carried in foreign bottoms as is ours. Retaliatory action against American vessels in foreign ports might likewise be considered, but the employment of such tactics would

probably exacerbate and broaden the present dispute. Virtually none of the predictable responses of a foreign shipowner to picketing of this type, therefore, would be limited to the sort of wage-cost decision benefitting American workingmen which the LMRA was designed to regulate. This case therefore, falls under *Benz* rather than under *Ariadne*. (415 U.S. at 114-15.)

Title III of the ADA should likewise be viewed under the lense of *Windward Shipping*'s "more than a negligible impact on the 'maritime operations' of . . . foreign ships" standard. Id. at 114. Just as this Court has given a wide ambit to "maritime operations" in the context of establishing admiralty jurisdiction over maritime contracts, see *Norfolk Southern Railway Co. v. Kirby*, 125 S.Ct. 385, 394 (2004) (quoting *Kuehne & Nagel (AG & Co.) v. Geosource, Inc.*, 874 F.2d 283, 290 (5th Cir. 1989)), and for maritime torts, see *Grubart v. Great Lakes Dredge Co.*, 513 U.S. 527, 540 (1995), so too should it be regarded insofar as the *McCulloch-Benz* canon is concerned.

II. The *McCulloch-Benz* Presumption Gives Effect to U.S. International Maritime Obligations, and Prevents Inadvertent Legislation Regarding Foreign Vessel Construction, Design, Equipment and Manning.

In addition to casting doubt on the propriety of the *McCulloch-Benz* canon, Petitioners and their *amici* also disparage the nature and content of such international maritime law norms as deference to the flag State for regulation of vessel construction, design and equipment, as well as restrictions on the ability of nations to unilaterally impose CDEM regulations in excess of international standards. To say the least, most of these criticisms are unjustified, and quite beside the point of this case – the proper construction of the ADA in light of the *McCulloch-Benz* canon. *Amici* P&I Clubs submit that the most important purpose of the *McCulloch-Benz* clear statement rule is to facilitate the accomplishment of the United States' international maritime law obligations, a goal certainly worthy of a nation with a great seafaring tradition and dependence on ocean trade.

A. International Maritime Law Limits Port States from Unilaterally Imposing CDEM Regulations Exceeding Global Standards.

As reflected in the *McCulloch-Benz* line of decisions, and their precursors, it has long been an article of faith in U.S. maritime practice that flag States have the principal competence to prescribe, monitor and enforce international vessel safety norms for their ships. See *McCulloch*, 372 U.S. at 21 ("the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship"); *Wildenhus*, 120 U.S. at 12 ("And so by comity it came to be generally understood among civilized nations that all matters of discipline, and all things done on board, which affected only the vessel, or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation, or the interests of its commerce should require."); *Lauritzen*, 345 U.S. at 585 ("the law of the flag [is used] on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her.").

Contemporary international law prescribes substantial duties for flag States. According to the 1958 Geneva Convention on the High Seas, to which the United States is a party, "[e]very State shall take such measures for ships under its flag as are necessary to ensure safety at sea with regard *inter alia* to . . . [t]he construction, equipment and seaworthiness of ships,"

and "[i]n taking such measures each State is required to conform to generally accepted international standards and to take any steps which may be necessary to ensure their observance." Apr. 29, 1958, art. 10, 13 U.S.T. 2312, 450 U.N.T.S. 82;[2] see also RESTATEMENT (3D) FOREIGN RELATIONS LAW § 502 (1987).

None of this is to suggest, however, that port States have no role to play in the enforcement of international CDEM standards, even as regards to foreign vessels. Congress has, by statute, prescribed that foreign vessels visiting U.S. ports must be in compliance with such International Maritime Organization instruments as the Convention on Safety of Life at Sea (SOLAS), see 46 U.S.C. 3505, and the Convention on the Prevention of Marine Pollution (MARPOL), see 33 U.S.C. 1904(c) & (d). The significance of these Acts is that, first, Congress expressly legislated for foreign-flagged vessels (thus satisfying the *McCulloch-Benz* canon), and, second, that the United States was only imposing on foreign vessels

[2] These provisions are substantially elaborated in the U.N. Convention on the Law of the Sea (UNCLOS), Dec. 10, 1982, 1833 U.N.T.S. 397, 21 International Legal Materials 1261 (1982). See id. arts. 94(3)(a) (flag State duties); 217(2) (flag State has duty to establish CDEM regulations); 21(2) (restricting ability of coastal State to unilaterally impose CDEM regulations in excess of international standards on vessels within territorial seas); 194(3)(b) (delegating to relevant international institutions, including the IMO, the power to establish global CDEM regulations to prevent marine pollution); 211(6)(c) (restricting ability of coastal States to prescribe anti-pollution CDEM regulations in excess of international standards). The United States has signed UNCLOS, although the treaty has not yet received advice and consent by the Senate. In any event, the above-cited provisions have been regarded by the U.S. government as reflecting pre-existing customary international law.

internationally-established CDEM regulations. The essence of port State control is to provide additional means of inspecting vessels and enforcing already agreed international norms. See RESTATEMENT (3D) FOREIGN RELATIONS LAW § 512, cmt. c. *Amici* P&I Clubs fully subscribe to this role for port and coastal States in the improvement of global shipping rules. In the same fashion, *amici* support continued improvements for the private law role played by marine insurers and Classification Societies (certification bodies which regularly inspect vessels, often as a condition of insurability) in guaranteeing the highest standards of vessel operation and safety.

These considerations of flag State primacy should even apply in the context of vessels flagged in open registries, or so-called "flags of convenience." International law requires a genuine link between the vessel, its owners and operators, and the flag State. See Geneva Convention on the High Seas, *supra*, art. 5(1) ("There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."); RESTATEMENT (3D) FOREIGN RELATIONS LAW § 501, cmt. b. This Court has recognized the role of a flag State, even an open registry, in managing the maritime operations of a vessel. See *Lauritzen*, 345 U.S. at 584 ("Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and its flag. The United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state.").

The argument propounded here by Petitioners and their *amici* is really an attempt to subvert the balance between flag

State and port State authority over vessel construction, design and equipment standards, and to give *carte blanche* to coastal States in unilaterally legislating at variance with international maritime rules. And while *amici* P&I Clubs do not doubt that Congress has the power to adopt legislation that, while conflicting with U.S. maritime treaty obligations, would still have domestic effect, at a minimum the *McCulloch-Benz* canon of statutory construction is intended to ensure that Congress does not legislate in regards to foreign vessels in an inadvertent or unintentioned manner.

This Court has consistently indicated that it is prepared to interpret both federal and state statutes agreeably with international maritime law standards. In *Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER*, 515 U.S. 528 (1995), Justice Kennedy, writing for the Court in a case involving arbitration of marine cargo disputes, noted that "[i]f the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements." Id. at 539. Specifically in the context of vessel CDEM regulations, this Court has observed that there is "a decided congressional preference for arriving at international standards for building tank vessels." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 166-67 (1978) (citing and quoting congressional statements to that effect); see also *United States v. Locke*, 529 U.S. 89, 102-03 (2000) (considering, without deciding, effect of U.S. treaty obligations on vessel CDEM regulations in preempting contrary state law). This Court should, in this case, extend the same solicitude to international maritime treaties by properly applying the *McCulloch-Benz* canon to the ADA.

B. The *McCulloch-Benz* Canon is a Natural Corollary to the Presumption Against Extraterritorial Application of U.S. Law.

In rendering its decision, the court of appeals below considered another clear statement rule, stipulating that Congress is not presumed to legislate extraterritorially, unless such intent is manifestly indicated in the text of the Act. Known as the *Foley* presumption, from its primary articulation by this Court in *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949), this presumption is analytically distinct from the *McCulloch-Benz* canon. Nonetheless, the court below ruled that insofar as Title III of the ADA imposed CDEM requirements on foreign vessels calling at U.S. ports, requiring substantial construction and equipment alterations, such rules would have extraterritorial effect as soon as the subject vessel left U.S. waters. See Pet. App. 11a.

Amici P&I Clubs believe that this case can be properly decided within the contours of the *McCulloch-Benz* canon, and this Court need not opine as to the broader extraterritorial effects of the ADA. Nevertheless, it is worth noting that the *Foley* presumption is logically related to the *McCulloch-Benz* canon, and so may remain relevant as a background clear statement rule, reflecting this Court's desire to protect against "unintended clashes between our laws and those of other nations which could result in international discord." *Equal Employment Opportunity Comm'n v. Arabian American Oil Co. (ARAMCO)*, 499 U.S. 244, 248 (1991).

This Court has showed increasing sensitivity to the interests of other nations with the development of the *Foley* presumption and the *McCulloch-Benz* canon. In *Foley*, this Court declined to apply the Eight Hour Act to work conducted in foreign countries in the absence of any clear statutory language suggesting that Congress intended to apply the Act

extraterritorially. See 336 U.S. at 284-85. In so doing, the *Foley* Court articulated a presumption against extraterritoriality, stating that Congress is assumed to be concerned primarily with domestic matters and therefore, "unless a contrary intent appears, [legislation of Congress] is meant to apply only within the territorial jurisdiction of the United States." Id. at 285; see also id. at 292 (courts should not, "in the absence of an explicit declaration of policy, assume that Congress meant to impose . . . domestic standards. . . upon peoples who are not generally subject to the regulatory power of Congress.") (Frankfurter, J., concurring); *Smith v. United States,* 507 U.S. 197, 204 n.5 (1993) ("Congress generally legislates with domestic concerns in mind."). The *Foley* doctrine suggests that, absent a clear statement of affirmative intent, Congress is presumed *not* to apply legislation extraterritorially or upon persons who are not normally subject to its laws merely because it may have the power to do so.

As in *Foley*, the *McCulloch-Benz* canon emphasizes that, absent an express and affirmative statement by Congress to do so, the Court should forego broad application of U.S. laws to foreign vessels, in order to minimize international discord. *Benz,* 353 U.S. at 142-43.

> It follows that if Congress had so chosen, it could have made the Act applicable to wage disputes arising on foreign vessels between nationals of other countries when the vessel comes within our territorial waters. The question here therefore narrows to one of intent of the Congress as to the coverage of the Act. The parties point to nothing in the Act itself or its legislative history that indicates in any way that the Congress intended to bring such disputes within the coverage of the Act. . . .It may well be that American laws should not be construed to apply, without some more explicit Congressional

> indication than we are able to find in the [NLRA], as amended, to situations with as many points of foreign contact as the situation at bar.

Id.; see also id. at 147 n.7 (citing *Brown v. Duchesne,* 60 U.S. 183, 197 (1857) ("laws. . . should not be strained by technical constructions to reach cases which Congress evidently could not have contemplated, without departing from the principle upon which they were legislating, and going far beyond the object they intended to accomplish")).

C. Statutes should be read consistently with U.S. obligations under international maritime law.

There is one final canon of statutory construction that can inform the Court's judgment here. The *Charming Betsy* principle – the name being derived from the *locus classicus* of the doctrine -- counsels that Acts of Congress should be construed, wherever possible, consistent with this country's international obligations. The *Charming Betsy* rule is a statutory tool of construction that is distinct from the presumption against extraterritoriality and the *McCulloch-Benz* canon. See *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) (noting that "[the *Charming Betsy*] canon is 'wholly independent' of the presumption against extraterritoriality"). Operation of this principle ensures against inadvertent abrogations of U.S. obligations under its treaties and customary international law.

Since the early nineteenth century, this Court has recognized that acts of Congress are "never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The CHARMING BETSY,* 6 U.S. (2 Cranch) 64, 118 (1804); *Weinberger v. Rossi,* 456 U.S. 25, 32 (1982) (applying the *Charming Betsy* canon to narrowly interpret a federal statute in deference to an executive agreement between

the United States and the Philippines). Statutes must be construed in accord with international obligations absent a clear and affirmative expression of Congressional intent to the contrary. Id. at 35. Statutory ambiguity or silence is insufficient to abrogate an international obligation. Id. ("ambiguous . . . meaning when examined in context, is insufficient to establish the kind of affirmative congressional expression necessary to evidence an intent to abrogate provisions in . . . international agreements"); *Trans World Airlines, Inc. v. Franklin Mint Corp.* 466 U.S. 243, 252 (1984) (citing *Cook v. United States*, 288 U.S. 102, 120 (1933) ("There is, first, a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action. 'A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.'")).

The *Charming Betsy* doctrine has clear relevance to cases involving the application of general statutes to foreign ships. See *McCulloch,* 372 U.S. at 21 (applying the *Charming Betsy* canon to restrict application of the NLRA to foreign-flag vessels). In maritime law, this Court has consistently construed "generally worded statutes . . . in light of international law." *Hartford Fire Ins.*, 509 U.S. at 816 (Scalia, J., dissenting) (citing *Lauritzen, Romero,* and *McCulloch*).

More recently, in *F. Hoffmann-La Roche, Ltd. v. Empagran,* 124 S.Ct. 2359 (2004), this Court articulated the rationale behind the *Charming Betsy* canon, emphasizing the need to avoid international conflict with domestic law.

> This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony – a harmony particularly needed in today's

> highly interdependent commercial world. (Id. at 2366.)

Then, in a passage as revealing in its citations as its content, it was noted that

> this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. See, *e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 20-22 (1963) (application of National Labor Relations Act to foreign-flag vessels); *Romero v. Int'l Terminal Operating Co.,* 358 U.S. 354, 382-383 (1959) (application of Jones Act in maritime case); *Lauritzen v. Larsen,* 345 U.S. 571, 578 (1953) (same). This rule of construction reflects principles of customary international law – law that (we must assume) Congress ordinarily seeks to follow. (Id.)

Quite clearly, while the Court has acknowledged that the *McCulloch-Benz* and *Charming Betsy* canons are separate and distinct – operating in somewhat different spheres – they nonetheless serve the same important object and purpose.

III. The *McCulloch-Benz* Canon Should be Applied, Notwithstanding the Executive Branch's Selective Position.

Amici P&I Clubs acknowledge that the United States has taken a position contrary to that advanced here. Nevertheless, there are compelling reasons for this Court not to extend to the United States' position any special deference. The United States' veiled argument, U.S. Amicus Br. 14-15, to apply some version of deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), is especially inappropriate and ill-advised.

First, informal administrative opinions, such as the PVAAC guidelines (relied upon by Petitioners), are entitled to

little weight, and certainly not *Chevron* deference. Agency "[i]nterpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference. Instead, interpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but only to the extent that those interpretations have the 'power to persuade'." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (citing *ARAMCO*, 499 U.S. at 256-58).

More significantly, *Chevron* deference cannot be deployed to overcome a clear statement rule, such as the *McCulloch-Benz* canon. "[D]eference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ. Given the presumption against extraterritoriality that the Court accurately describes, and the requirement that the intent to overcome it be 'clearly expressed,' it is in my view not reasonable to give effect to mere implications from the statutory language as the EEOC has done." *ARAMCO*, 499 U.S. at 260 (Scalia, J., concurring).

This Court has previously rejected agency interpretations that conflict with maritime and international law obligations. *ARAMCO*, 499 U.S. at 257-58 (finding that EEOC's interpretation of Title VII is "insufficiently weighty to overcome the presumption against extraterritorial application"); *McCulloch*, 372 U.S. at 18 (refusing to defer to the NLRB's interpretation that the NLRA should apply to foreign vessels, where the Act lacked a clear expression of affirmative intent to contravene international law). In *McCulloch*, this Court observed that the NLRB's statutory construction conflicted with the "well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship." Id. at

21. In refusing to defer to the agency's statutory interpretation, this Court emphasized that Acts of Congress must be interpreted principally in accordance with international obligations. Id. ("questions of such international import would remain as to invite retaliatory action from other nations . . . .").

As already discussed, the *McCulloch-Benz* canon should not be applied as a surrogate for the Executive branch's situational position in a particular case, or in regards to a particular statutory provision. Rather, the canon ensures that Congress is counseled to legislate in a manner consistent with international maritime law, pursuant to its power under the Foreign Commerce Clause, and mindful of the uniformity and federalism limitations inherent in such provisions as the Port Preference Clause. See *MacLeod v United States*, 229 U.S. 416, 434 (1913) ("statute should be construed in the light of the purpose of the government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe, and which were founded upon the principles of international law."). In short, the *McCulloch-Benz* canon recognizes the boundary of Presidential and Congressional control over issues of maritime commerce, and should not be lightly ignored simply because the Executive Branch adopts an informal position in a particular controversy.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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January 28, 2005[3]

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[3] Counsel acknowledges the assistance of the following Emory Law School students in the preparation of this Brief: Susan E. Burnett, Kent William Collier, Justin S. DuClos, Kimberly Hosley, Michael G. Parisi, and Stefanie Warren.